MURALY SUBRAMANIAM v. PP

HIGH COURT MALAYA, IPOH
SU TIANG JOO JC
[NOTICE OF MOTION NO: AA-44-3-02-2021]
18 MAY 2021

CRIMINAL PROCEDURE: *Bail – Application for – Accused charged with trafficking offence under s. 39B(1)(a) of Dangerous Drugs Act 1952 – Whether bail could be granted to accused person charged with offence punishable by death – Accused suffering from serious medical conditions – Factors considered – Whether s. 41B(1)(a) of DDA ought to be read subject to s. 388(1) of Criminal Procedure Code – Federal Constitution, arts. 5 & 8*

The applicant was accused of trafficking 1576.9g of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'), which, if convicted, would subject him to the death penalty. Section 41B(1)(a) of the DDA expressly provides that bail shall not be granted to an accused person charged with an offence which is punishable with death. The applicant applied for bail. The application was supported by an affidavit (encl. 7) affirmed by the wife of the applicant. She deposed that the applicant was suffering from end-stage renal failure requiring dialysis three times a week at the Seri Manjung Hospital in Perak since 2009. Whilst under detention, he received treatment at the Taiping Hospital, Perak and had commenced dialysis treatment with medication. However, the applicant's wife deposed that they were dissatisfied with the regularity of the dialysis treatment and the type of medication being dispensed at the Taiping Hospital as compared to that at the Seri Manjung Hospital. The applicant was also suffering from hypertension, bilateral central vein thrombosis and failed continuous ambulatory peritoneal dialysis. With the applicant facing a long drawn trial and given his poor state of health, he prayed to be given bail based upon his means and he asserted he was prepared to abide by any other conditions deemed fit such as to report to any nearby police station and to surrender his passport to be kept with the court until the disposal of his case. The applicant asserted that s. 41B(1)(a) of the DDA is to be read subject to s. 388(1) of the Criminal Procedure Code ('CPC') where a discretion is conferred upon the court to grant bail to an accused who is a person under 16 years of age, a woman or is sick or infirm and this provision should apply equally to the applicant by reason of the equality provision housed within art. 8 of the FC; and that premised upon the judicial powers conferred upon this court by art. 121(1) of the FC, s. 41B(1)(a) of the DDA which purports to take away such a discretion is unconstitutional. The applicant also relied on art. 5 of the FC, akin to an accused person who is entitled to be represented by competent legal counsel of his choice under art. 5 of the FC, the applicant submitted he ought to be entitled to be treated by a competent doctor of his own choice.

Held (dismissing application for bail):

(1) In light of the express provision of s. 41B(1) and (2) of the DDA, as well as the apex court authority of *PP v. Chew Siew Luan* and *PP v. Leong Ying Ming* which had conclusively decided that an accused was not amenable to bail if he was charged with an offence punishable with death or imprisonment of more than five years under the DDA, the bail application ought to have been dismissed outright. To grant bail despite the clear prohibition housed within s. 41B of the DDA would clearly frustrate the object sought to be achieved in Parliament, and by extension this nation's battle against the scourge of dangerous drugs and in particular drug trafficking with all its well known attendant social ills caused thereby. This court's function is to interpret legislation and not to legislate. (paras 35, 37 & 42)

(2) It could not be gainsaid that the absolute prohibition against bail in s. 41B(1)(a) and (b) applies equally to all accused persons irrespective of whether they are male, female, sick or infirm and by reason thereto, the submission that by reason of his medical condition, the applicant ought to be amenable to bail, was without merit. There was no contravention of the fundamental liberty provision on equality housed within art. 8 of the FC. Indeed, only if an accused is lawfully charged with an offence that is punishable with death or a sentence of imprisonment of five years or more that the absolute prohibition under s. 41B(1)(a) and (b) of the DDA applies and in this case, it applied to the applicant. To add in the provisions of s. 388 of the CPC into s. 41B of the DDA under which bail may be given under certain circumstances would be for Parliament and not for this court to do so. (paras 45 & 46)

(3) Equating the right to consult and be defended by a competent legal practitioner of his choice with the right to consult and be treated by a medical practitioner of his choice was an overstretch. This right given under art. 5(3) of the FC is an entitlement when one is arrested to seek legal representation where one calls a lawyer and not a doctor or for good measure a dentist, dermatologist or herbalist who would all be medical practitioners in their own right. The applicant was given the appropriate treatment for his medical condition including being sent for kidney dialysis three times a week. Further, there was much force in the prosecution's assertion that the regimented life which included the medical regime foisted by the force of law upon the applicant would probably better secure the applicant's attendance in court for his trial because if left to his own devices, the applicant may not be as disciplined in attending to his own medical regime which would probably result in his trial being adjourned from time to time with the production of a medical certificate. (paras 50 & 51)

Case(s) referred to:
Che Su Daud v. PP [1978] 1 LNS 23 HC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 CA ***(refd)***
Ganesan Muniandy lwn. PP [2018] 1 LNS 1353 HC ***(refd)***
Letitia Bosman v. PP & Other Appeals [2020] 8 CLJ 147 FC ***(refd)***
Loy Chin Hei v. PP [1981] CLJ 177; 1981] CLJ (Rep) 178 HC ***(refd)***
MRCB Builders Sdn Bhd v. Southern Builders (J) Sdn Bhd [2018] 1 LNS 1508 CA ***(refd)***
PP v. Ajim Otoh [2017] 2 CLJ 240 HC ***(refd)***
PP v. Chan Cheng Sim [1993] 3 CLJ 661 HC ***(refd)***
PP v. Chew Siew Luan [1980] 1 LNS 210 ***(refd)***
PP v. Chew Siew Luan [1982] CLJ 354; [1982] CLJ (Rep) 285 FC ***(refd)***
PP v. Dato' Balwant Singh [2002] 4 CLJ 155 HC ***(refd)***
PP v. Ilamaran Kanniappan [1992] 1 CLJ 492; [1992] 3 CLJ (Rep) 224 HC ***(refd)***
PP v. Leong Ying Ming [1993] 2 CLJ 143 SC ***(refd)***
PP v. Marwan Ismail [2008] 3 CLJ 164 CA ***(refd)***
PP v. Tengku Mahmood Iskandar & Anor [1973] 1 LNS 124 HC ***(refd)***
Puan Saad v. PP [2021] 1 CLJ 121 HC ***(refd)***
Raman Shunmugham lwn. PP [2020] 2 CLJ 818 CA ***(refd)***
Saminathan Ganesan v. PP [2020] 3 CLJ 398 HC ***(refd)***
Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93 FC ***(refd)***
Suresh Kumar Velayuthan v. PP [2020] 4 CLJ 270 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 388(1)
Dangerous Drugs Act 1952, ss. 39A(2), 39B(1)(a), 41B(1)(a), (b), (c)
Federal Constitution, arts. 5(3), 8(1), 121(1)
Penal Code, ss. 130J, 130JB, 130V(1)
Security Offences (Special Measures) Act 2012, s. 13(2)(c)

For the applicant - Charan Singh Kartar Singh; M/s Nurul & Charan
For the respondent - Maziyah Mansor; DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Su Tiang Joo JC:

Q: Whether a sick or infirm person accused of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) ("DDA") should be amenable to bail in keeping with the exception on non-bailable offences under s. 388(1) of the Criminal Procedure Code ("CPC") and s. 13(2)(c) of the Security Offences (Special Measures) Act 2012 ("SOSMA").

Introduction

[1] The charge the applicant faces is as follows:

> Bahawa kamu pada 6 Ogos 2019, jam lebih kurang 10:15 malam, di hadapan rumah No. 25, Jalan Kampung Sitiawan, Taman Indah 30 Muhibbah, di dalam Daerah Manjung, Negeri Perak Darul Ridzuan kerana mengedar dadah berbahaya, iaitu sejumlah berat 1576.9 gram

A Cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama

[2] In summary, the applicant is accused of trafficking 1576.9g of cannabis and if convicted, he is subject to the death penalty.

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[3] Subsection 41B(1)(a) of the DDA expressly provides that bail shall not be granted to an accused person charged with an offence which is punishable with death.

[4] By notice of motion dated 5 February 2021 (encl. 1), the applicant C applies for bail. The prosecution who is the respondent opposed the application.

[5] After hearing counsel on 1 April 2021, I delivered decision on 20 April 2021 dismissing the application. Dissatisfied, the applicant appeals to the Court of Appeal by notice of appeal dated 28 April 2021 and these D are the grounds of my judgment.

Whether Decision Is Appealable

[6] The Court of Appeal in *Dato' Seri Anwar Ibrahim v. PP* [1999] 1 CLJ 537 held that:

E The grant or refusal of bail is a ruling made in the course of a trial or hearing of any cause or matter which does not finally determine the rights of the parties. The grant or refusal of bail is therefore not a 'decision' within the meaning of that word in s. 3 of the CJA. That being so, the order of the High Court in refusing to admit the appellant to bail is **not appealable** to the Court of Appeal.

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[7] However, conscious that the applicant is facing a capital offence with a prospective long period of remand and with him being sick, I feel that the applicant and his family, and in particular his wife, who is fighting tenaciously for him to be released on bail, ought to know the reasons why G I had dismissed his application and I set out herein the full grounds for my decision.

Current Status Of The Drug Trafficking Charge

[8] The trial of the drug trafficking charge against the applicant commenced on 20 April 2021 and is currently part-heard.

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[9] The prosecution has a list of 13 witnesses and as at the time of writing these grounds, the cross-examination of the second witness for the prosecution has yet to be completed. Trial is scheduled to continue on 5 August 2021, 2 September 2021, 21 October 2021, 26 October 2021, 28 October 2021 and 23 November 2021 respectively.

I

Grounds For The Application

[10] The application is supported by an affidavit (encl. 7) affirmed by the wife of the applicant. She deposed that the applicant is suffering from end-stage renal failure requiring dialysis three times a week at the Seri Manjung Hospital, Perak, since February 2009. The applicant is on medication and has dietary constraints (encl. 7 exh. B).

[11] The applicant was arrested on 6 August 2019 and was not offered bail.

[12] Whilst under detention, he received treatment at the Taiping Hospital, Perak and has commenced dialysis treatment with medication. However, the applicant's wife deposed that they are dissatisfied with the regularity of the dialysis treatment and type of medication being dispensed at the Taiping Hospital as compared to that at the Seri Manjung Hospital.

[13] She further deposed that the applicant had on several occasions slipped into a state of coma due to his chronic renal ailment resulting in him being warded at the intensive care unit of the Taiping Hospital.

[14] The applicant is also suffering from hypertension, bilateral central vein thrombosis and failed continuous ambulatory peritoneal dialysis.

[15] The applicant's spouse in her affidavit in support (encl. 7 para. 10) alleges that the food served to the applicant whilst under remand in the Taiping prison has contributed to the deterioration of the applicant's health because the applicant is served with food served to a normal individual similar to that served to all the detenus.

[16] With the applicant facing a long-drawn trial and given his poor state of health, he prays to be given bail based upon his means and he asserted he is prepared to abide by any other conditions deemed fit such as to report to any nearby police station and to surrender his passport to be kept with the court until the disposal of his case.

Respondent's Reply On The Applicant's Medical Condition And Treatment

[17] By an affidavit in reply, Doctor Navin Esavik Vikrama (encl. 8) deposed that he is the medical officer on duty at the clinic at the Taiping prison and is responsible for the treatment of the applicant.

[18] He confirms that the applicant is suffering from renal disease and requires dialysis at the Taiping Hospital three times a week on Mondays, Wednesdays and Fridays where he is under the care of the Specialist Nephrology Clinic.

[19] He deposed that the applicant is receiving the treatment, medication and diet appropriate for a patient with kidney disease. If necessary or if there is any lack of facilities in the prison, the appellant will be brought to the Taiping Hospital.

Further Grounds - Innocent Until Proven Guilty And Fundamental Right To Be Treated Equally Under Article 8 Of The Federal Constitution

[20] Reliance was also placed by the applicant upon the fact that until he is found guilty, he should be entitled to bail (encl. 7 para. 13). He gives the assurance that he shall without fail attend court as and when required.

[21] As will be seen in the legal arguments canvassed below, the applicant's spouse concluded her supporting affidavit (encl. 7 para. 16) by deposing that the applicant is entitled to be treated equally under the law on bail and cited art. 8 of the Federal Constitution ("FC") in support.

Staggered Trial

[22] Undoubtedly, the applicant is a sick and infirm person.

[23] Although I had denied bail premised upon the provisions of the law, I had sought to have the trial expedited by seeking to fix a series of continuous days for hearing.

[24] However, by reason of the COVID-19 pandemic and the need for those under remand to be quarantined for a period of time as and when they are moved from the prison to the central lock-up in preparation to be brought to court and, the need for the applicant to undergo kidney dialysis three times a week, the days in which the applicant can attend court for trial presented a logistical challenge.

[25] The learned Deputy Public Prosecutor informed the court that when the applicant is moved to and from the Taiping Prison where he is being remanded to the Ipoh Central Lock-Up in preparation to be brought to this court and then back to the Taiping Hospital for his dialysis treatment followed by the need for the applicant to be quarantined for a period of time due to the COVID-19 pandemic, a period of about 24 days has to elapse before he can be brought to court for his trial.

[26] In short, the applicant can only be brought to court for trial every 25 days.

Court's Analysis And Findings

[27] Against the above backdrop, and premised upon the intitulement of his notice of motion in encl. 1 and the affidavits filed, the applicant launched a frontal attack against the provisions of sub-s. 41B(1)(a) of the DDA which expressly provides that bail shall not be granted to an accused person charged with an offence which is punishable with death.

[28] In summary, the applicant asserted that:

(i) subsection 41B(1)(a) of the DDA is to be read subject to sub-s. 388(1) of the CPC where a discretion is conferred upon the court to grant bail to an accused who is a person under 16 years of age, a woman or is sick

or infirm and this provision should apply equally to the applicant by reason of the equality provision housed within art. 8 of the Federal Constitution; and

(ii) that premised upon the judicial powers conferred upon this Honourable Court by art. 121(1) of the Federal Constitution, sub-s. 41B(1)(a) of the DDA which purports to take away such a discretion is unconstitutional.

[29] Subsequently, by way of further written submissions, the applicant raised another ground to support his application for bail. This time, relying upon art. 5 of the Federal Constitution, akin to an accused person who is entitled to be represented by competent legal counsel of his choice under art. 5 of the Federal Constitution, the applicant submitted he ought to be entitled to be treated by a competent doctor of his own choice.

Article 8 Federal Constitution And Subsection 388(1) CPC Argument

[30] It would be useful to set out the provisions of art. 8(1) of the Federal Constitution and sub-s. 388(1) of the CPC which I reproduce hereunder:

(i) Federal Constitution

8. Equality

(1) All persons are equal before the law and entitled to the equal protection of the law.

(2) ...

(3) ...

(4) ...

(5) ...

(ii) Criminal Procedure Code (Act 593)

388 When person accused of non-bailable offence may be released on bail

(1) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a court, he may be released on bail by the officer in charge of the police district or by that court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:

Provided that the court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

(2) ...

(3) ...

(4) ...

(5) ...

[31] Learned counsel for the applicant in his primary written submissions (encl. 13) relied upon the judgment of Abdul Hamid J whom learned counsel described as Abdul Hamid FJ (*sic*) in the case of *PP v. Chew Siew Luan* [1980] 1 LNS 210 where the female (pregnant) accused faced a similar drug trafficking charge under the DDA, punishable with death upon conviction, and the learned judge relying upon the provisions of sub-s. 388(1) of the CPC held that the court has a discretion to grant bail for a non-bailable offence carrying life imprisonment or death as penalty to an accused who is a person under 16 years of age or a woman or is sick and infirm. His Lordship then proceeded to dismiss the appeal by the prosecution against the decision of the Sessions Court which had granted bail.

[32] However, as pointed out by the learned Deputy Public Prosecutor, the prosecution appealed and at the Federal Court in *PP v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285 Raja Azlan Shah CJ Malaya speaking for the Federal Court in words which are highly pertinent to the application before me and which I gratefully quote *in extenso* therefrom said:

> On appeal by the Public Prosecutor against the order so made granting bail the learned Judge dismissed it stating that s. 41B(1) and (2) of the Dangerous Drugs Act does not override the proviso to s. 388(1) of the Criminal Procedure Code. He seemed to think that s. 41B of the Act should not be construed as having the effect of fettering the discretion to grant bail under the provisions of the Criminal Procedure Code in cases covered by the proviso to s. 388(1) thereof. Section 41B(1) of the Dangerous Drugs Act provides:
>
> (1) Bail shall not be granted to an accused person charged with an offence under this Act:
>
> (a) where the offence is punishable with death; or
>
> (b) where the offence is punishable with imprisonment for more than five years; or?
>
> (c) where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.
>
> (2) **The provisions of sub-s. (1) shall have effect notwithstanding any other written law or any rule of law to the contrary**.
>
> (emphasis added)
>
> ...
>
> The Dangerous Drugs Act 1952 (Revised - 1980) is an Act specifically designed to regulate the importation, exportation, manufacture, sale and use of, *inter alia*, dangerous drugs, and 'to make special provisions relating

to the jurisdiction of courts in respect of offences thereunder and their trial, and for purposes connected therewith'. In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular that s. 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act 1978 (Act A426) and became operative on 10 March 1978. *Generalibus specialia derogant is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law. [See also PP v. Chu Beow Hin [1982] CLJ (Rep) 288* at p. 291]. The provisions of s. 3 of the Criminal Procedure Code which counsel for the respondent seeks to rely on has no relevance whatsoever to the matter in issue before us.

It would be erroneous to apply expressions used and provisions made in a statute to another and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object. On the other hand, it is a sound, and, indeed, a well-known principle of construction of a statute that the purport of words and expressions used in a legislative measure must take their colour from the context in which they appear. *We do not therefore agree with the learned Judge that it is open to a court to subject the express provisions regarding bail in s. 41B of the Dangerous Drugs Act to the provisions relating thereto in the Criminal Procedure Code. The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must ex necessitate yield to the specific provisions of s. 41B of the Dangerous Drugs Act in that regard*. We should perhaps also observe *en passant* that any other construction would result in nullifying the purport and effect of the provisions of s. 41B(1)(c) of the Dangerous Drugs Act and render otiose and ineffective a certificate of the Public Prosecutor thereunder that it is not in the public interest to grant bail to a person accused of an offence under the Dangerous Drugs Act punishable with imprisonment for five years or less.

[33] Before moving on, with respect, I would like to echo the words of His Lordship Wan Yahya J (who retired as FCJ) in *PP v. Ilamaran Kanniappan* [1992] 1 CLJ 492; [1992] 3 CLJ (Rep) 224 at p. 226 para e that:

> *Counsel is no doubt entitled to cite one differing authority in preference to another by courts of co-ordinate jurisdiction but when the same question of law has been settled by a judgment of a higher court, then Counsel as an officer of the court is duty bound to disclose the case to the court, unless of course he is totally oblivious of the subsequent binding judgment*.
>
> (emphasis added)

Although the Court of Appeal in *PP v. Marwan Ismail* [2008] 3 CLJ 164 held that the decision in *Ilamaran Kanniappan* (*supra*) that an accused person may be remanded in custody pending the outcome of the drug analysis was wrongly decided because the DDA does not empower a Magistrate to

A remand an accused person tentatively charged for trafficking under s. 39B(1), the final decision in *Illamaran Kanniapan* (*supra*) that bail ought to be denied was not discussed nor overturned.

[34] Learned counsel for the applicant also cited the following authorities in support of the application for bail:

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(i) *Raman Shunmugham lwn. PP* [2020] 2 CLJ 818 CA where the accused was charged under s. 130V(1) of the Penal Code and bail was granted pursuant to s. 13 of SOSMA;

(ii) *Puan Saad v. PP* [2021] 1 CLJ 121 HC where the accused was charged
C with a similar offence of drug trafficking under s. 39B(1)(a) of the DDA and bail was granted pursuant to s. 388(1) of the CPC but it is to be noted the learned Judicial Commissioner relied upon the High Court authority of *PP v. Chew Siew Luan* [1980] 1 LNS 210 instead of the Federal Court authority of *PP v. Chew Siew Luan* (*supra*);

D (iii) *Saminathan Ganesan v. PP* [2020] 3 CLJ 398 HC where the accused was charged with security offences under s. 130J and 130JB of the Penal Code and to be tried pursuant to the procedures under SOSMA;

(iv) *Che Su Daud v. PP* [1978] 1 LNS 23 HC where the accused was charged
E under s. 39B(1)(a) of the DDA and bail was granted by Gunn Chit Tuan J premised upon the provisions of s. 388 CPC but it is to be noted that the learned judge who later sat as CJ Malaya in the later Supreme Court case of *PP v. Leong Ying Ming* [1993] 2 CLJ 143 placed reliance upon the Federal Court case of *PP v. Chew Siew Luan* (*supra*) and held that the offence for which the accused was charged under s. 39A(2) of the DDA
F which is punishable with imprisonment of more than five years was not bailable under s. 41B(1)(b) of the DDA;

(v) *PP v. Dato' Balwant Singh* [2002] 4 CLJ 155 HC where the accused was charged with murder under the Penal Code and was granted bail by reason of his medical condition; and

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(vi) *Ganesan Muniandy lwn. PP* [2018] 1 LNS 1353 HC where the accused was charged under s. 130V(1) of the Penal Code and bail was granted pursuant to s. 13(2) of SOSMA as he was suffering from advanced lung cancer.

H **[35]** From the brief notes I have made against all the authorities relied upon by the applicant, it is clear that there is not a single authority which the applicant can cite which has gone against the Federal Court authority of *Chew Siew Luan* (*supra*) and the Supreme Court authority of *Leong Ying Ming* (*supra*) which have conclusively decided that an accused is not amenable to bail if
I he is charged with an offence punishable with death or imprisonment of more than five years under the DDA. It is unbailable.

[36] The learned Deputy Public Prosecutor in her written submissions (encl. 15) cited the further following authorities, all of which relied upon *PP v. Chew Siew Luan* (*supra*) and which held that the restriction on bail under sub-ss. 41B(1)(a) and (b) of the DDA is absolute and neither the court below nor the High Court has the power to grant bail to a person charged under the DDA with an offence punishable with death or more than five years' imprisonment or even for lesser terms under sub-s. 41B(1)(c) DDA when the Public Prosecutor certifies in writing that it is against the public interest to allow bail:

(i) *PP v. Leong Ying Ming* [1993] 2 CLJ 143 SC;

(ii) *PP v. Ilamaran Kanniappan* [1992] 1 CLJ 492; [1992] 3 CLJ (Rep) 224 HC;

(iii) *PP v. Chan Cheng Sim* [1993] 3 CLJ 661 HC;

(iv) *PP v. Ajim Otoh* [2017] 2 CLJ 240 HC; and

(v) *Loy Chin Hei v. PP* [1981] CLJ 177; [1981] CLJ (Rep) 178 HC

[37] In the light of the above express provision of sub-ss. 41B(1) and (2) of the DDA, as well as both the apex court authorities of *Chew Siew Luan* (*supra*) and *Leong Ying Ming* (*supra*) the bail application would have been dismissed outright but learned counsel for the applicant went on to add a constitutional dimension to his argument by invoking the provisions of art. 121(1) and art. 8 of the Federal Constitution to the effect that as the judicial power to adjudicate in civil or criminal matters brought before the courts are exclusive to the courts and such judicial power include the discretion to grant bail, any provision that sought to remove such a power is unconstitutional and reliance was placed upon the High Court authority of *Saminathan Ganesan v. PP* [2020] 3 CLJ 398 HC per Mohd Nazlan Ghazali J. However, in that case, the accused was not charged with an offence punishable with death under the DDA but instead he was charged with a security offence under SOSMA wherein s. 13 on bail under this Act and reproduced below allows for bail to be given under certain circumstances:

> (1) Bail shall not be granted to a person who has been charged with a security offence.
>
> **(2) Notwithstanding sub-s. (1):**
>
> **(a) a person below the age of eighteen years;**
>
> **(b) a woman; or**
>
> **(c) a sick or an infirm person,**
>
> charged with a security offence, other than an offence under Chapter VIA of the Penal Code [Act 574] and the Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770], **may be released on bail** subject

A to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code. (emphasis added)

[38] In another decision of the High Court, in *Suresh Kumar Velayuthan v. PP* [2020] 4 CLJ 270 HC, Collin Lawrence Sequerah J expressly differed B from the decision in *Saminathan* (*supra*) and *inter alia* held that the curtailment of freedom by the prohibition of bail save for certain circumstances in s. 13 of SOSMA is not out of proportion to the object to be achieved; namely, the prevention of action prejudicial to public order, or the security of the Federation or any part thereof and His Lordship concluded that s. 13 of C SOSMA was not *ultra vires* art. 121(1) of the Federal Constitution.

[39] With respect, the High Court in *Saminathan Ganesan v. PP* (*supra*) premised its decision on the basic structure of the Federal Constitution principle on separation of powers and in *Suresh Kumar Velayuthan v. PP* (*supra*) reliance was placed upon the proportion to the object to be achieved D principle. With all due respect, for purposes of deciding the application before this court, I favoured "the proportion to the object to be achieved" principle articulated in *Suresh Kumar* (*supra*) after checking with Hansard, which learned Deputy Public Prosecutor had very helpfully produced, on why s. 41B DDA was enacted.

E **[40]** With that, I turn to the objective for the absolute prohibition against bail housed within the provisions of sub-ss. 41B(1)(a) and (b) of the DDA.

[41] According to Hansard, in the second and third reading of the Bill for the proposed amendment to the DDA in 1978 to absolutely prohibit bail and F which led to the provisions in sub-ss. 41B(1)(a) and (b) of the DDA, the Minister said:

Adalah didapati bahawa melepaskan seseorang yang dituduh atas jaminan bagi sesuatu kesalahan di bawah Ordinan ini kerapkali menghampakan tujuan-tujuan pihak Pendakwa Raya kerana yang dituduh samada terus menjalankan dengan lebih giat lagi urusannya mengedarkan G dadah bahaya dengan tujuan mendapatkan lebih banyak wang bagi mengelakkan kesan sabitan dan hukuman yang akan diterima, atau, jika ia adalah seorang penagih, ia terus menghisap dadah sehingga ia tidak dapat dipulihkan bila perbicaraannya selesai. Oleh sedemikian adalah difikirkan bahawa dalam kes-kes yang boleh dikenakan hukuman mati atau penjara selama lebih daripada lima tahun, jaminan sekali-kali tidak H diberi kepada seseorang yang dituduh, dan di dalam kes-kes yang lain jaminan tidaklah diberi jika Pendakwa Raya memperakui secara bertulis bahawa bukannya bagi kepentingan awam untuk membenarkannya dijamin. Justeru itu, adalah dicadangkan untuk memasukkan suatu Seksyen 41B baharu di dalam Ordinan itu sebagaimana yang dinyatakan I ...

[42] Therefore, to grant bail despite the clear prohibition housed within s. 41B DDA would clearly frustrate the object sought to be achieved in Parliament's and, by extension this nation's battle against the scourge of dangerous drug abuse and in particular drug trafficking with all its well-known attendant social ills caused thereby. This court's function is to interpret legislation and not to legislate. See *MRCB Builders Sdn Bhd v. Southern Builders (J) Sdn Bhd* [2018] 1 LNS 1508 CA where Tengku Maimun Tuan Mat JCA (now CJ) said:

> [38] We, further, cannot agree with the appellant as sections 2 and 3 of CIPAA 2012 have already specifically provided for its application and non-application. We are mindful that it is not the function of the court to legislate but to interpret legislation. In the presence of such clear provisions, we cannot accede to the arguments of the appellant.

[43] At this juncture, it would be opportune, to state that the applicant submitted that with s. 41B of the DDA having been passed in 1978, it is, therefore, clearly post-Merdeka law and would clearly be subject to the FC. In my view, as will be made clear below, this does not in any way advance the bail application any further, if at all.

[44] Learned counsel for the applicant amplified his submissions by asserting that the impugned provisions are *ultra vires* art. 8 FC because by reason of the applicant being sick or infirm, he should be treated equally like all accused who are sick or infirm who would be entitled to bail for a non-bailable offence.

[45] It cannot be gainsaid that the absolute prohibition against bail in sub-ss. 41B(1)(a) and (b) applies equally to all accused irrespective of whether they are male, female, sick or infirm and by reason thereto, the submission that by reason of his medical condition he ought to be amenable to bail is without merit and in this regard, I am of the view that there is no contravention of the fundamental liberty provision on equality housed within art. 8 of the Federal Constitution. In fact, bail was denied to the female accused who was charged with drug trafficking punishable with death despite the fact that she was *enceinte* with accouchement in *PP v. Chew Siew Luan* (*supra*).

[46] Indeed, only if an accused is lawfully charged with an offence that is punishable with death or a sentence of imprisonment of five years or more that the absolute prohibition under sub-ss. 41B(1)(a) and (b) of the DDA applies and in this case, it applies to the applicant. To add in the provisions of s. 388 CPC into s. 41B DDA under which bail may be given under certain circumstances would be for Parliament and not this court to do so.

Article 5(1) Federal Constitution – Right To Be Attended To By A Doctor Of Own Choice

[47] Without raising the same in the intitulement of his notice of motion or in his affidavit, the applicant raised another argument on why he should be amenable to bail. Nevertheless, I considered the same seeing that the applicant is facing a capital offence and I was of the view that this irregularity should not stand in the way of giving him an opportunity to be heard on whatever ground he can raise to pursue his application for bail. In a similar vein, I had not given any weight to the technical objection raised by the applicant on the admissibility of one of the respondent's affidavits which omitted the date and place of affirmation but which was clearly affirmed before a Magistrate and filed in this court before submissions were exchanged.

[48] The fresh ground canvassed in the further written submissions (encl. 21) of the applicant is premised upon art. 5 of the FC that he should be allowed to consult a doctor of his own choice and not that provided by the prison authority. Article 5 of the FC provides:

> 5. Liberty of the person
>
> (1) No person shall be deprived of his life or personal liberty save in accordance with law.
>
> (2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.
>
> (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.
>
> (4) ...
>
> (5) ...

[49] The applicant equates the right to consult and be defended by a legal practitioner of his choice provided by art. 5(3) with the right to consult and be treated by a medical practitioner of his choice. Reliance was placed upon the authority of *Shamim Reza Abdul Samad v. PP* [2009] 6 CLJ 93 FC which held that flagrant or gross incompetence of counsel can be held to deprive an accused of a fair hearing so as to amount to a miscarriage of justice. Reliance was also placed upon the authority of *PP v. Tengku Mahmood Iskandar & Anor* [1973] 1 LNS 124; [1973] 1 MLJ 128 for the principle that the law should be sedulous in giving the accused the right to a fair trial and to be defended by counsel and this fundamental right must always be kept inviolate and inviolable, however, crushing the pressure of incriminating proof.

[50] With all due respect, I find equating the right to consult and be defended by a (competent) legal practitioner of his choice with the right to consult and be treated by a medical practitioner of his choice to be an overstretch. This right given under art. 5(3) FC is an entitlement when one is arrested to seek legal representation where one calls a lawyer and not a doctor or for good measure a dentist, dermatologist or herbalist who would all be medical practitioners in their own right.

[51] The court takes comfort with the averments in the affidavit of Doctor Navin Esavik Vikrama (*supra*) that the applicant is given the appropriate treatment for his medical condition including being sent for kidney dialysis three times a week. Further, there is much force in the prosecution's assertion that the regimented life which includes the medical regime foisted by the force of law upon the applicant would probably better secure the applicant's attendance in court for his trial because if left to his own devices, the applicant may not be as disciplined in attending to his own medical regime which would probably result in his trial being adjourned from time to time with the production of a medical certificate.

[52] I end with the words of YAA Azahar Mohamed CJ (Malaya) in *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147 FC that:

> The right to a fair trial is a constitutional guaranteed right. When the principle is applied to a criminal case, what it means is that an accused has a constitutional guaranteed right to receive a fair trial within a reasonable time by an impartial tribunal. However, the right to a fair trial as enshrined in cl. (1) of art. 5, is not absolute and is subject to qualifications which lies in the phrase 'save in accordance with law'. Therefore, the constitutional rights as guaranteed under cl. (1) of art. 5 can be taken away in accordance with law

[53] Under the DDA, where an accused is charged with an offence punishable with death or imprisonment of five years or more, there is an express prohibition of bail.

Conclusion

[54] Wherefore, I had dismissed the application for bail.